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No. 94-1966

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DWIGHT J. LOVING,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The United States, in its twenty-four page brief opposing the grant of certiorari in this case, made one summary statement that the Questions Presented "lack merit and do not warrant review." Brief in Opposition [hereinafter BIO] at 10. Nowhere else in its brief does the United States address any reason why this Court should not grant certiorari. Indeed, the entire brief addresses the merits of the Questions Presented and only highlights the need for this Court to grant certiorari to review these important constitutional issues of first impression and resolve these issues on the merits.

I. THE PRESIDENT LACKED AUTHORITY TO ESTABLISH AGGRAVATING FACTORS IN CAPITAL CASES.

A. Reply to U.C.M.J. Article 106a Argument.

Respondent argues that the conference report and the 1985 amendment to Uniform Code of Military Justice [hereinafter U.C.M.J.] article 106a, 10 U.S.C. § 906a, "reflects congressional understanding" and reliance on the premise "that the UCMJ, including Article 36 [10 U.S.C. § 836], gives the President delegated authority to promulgate aggravating factors in capital cases."[1] BIO at 11-12. Even assuming arguendo that this interpretation is correct, Respondent erred in citing this Court's opinions in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, —— U.S. ——, 115 S. Ct. 2407, 2414 (1995) and *Stone v. Immigration and Naturalization Service*, —— U.S. ——, 115 S. Ct. 1537, 1545, 1549 (1995), for the claimed proposition that "[w]here Congress has, as it did here, passed new legislation in specific reliance on a particular interpretation of existing laws, there is strong reason to give effect to that interpretation." BIO at 12.

In the first instance, *Babbitt* and *Stone* do not support the claimed proposition. These two cases declare only that, "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Babbitt*, 115 S. Ct. at 2414 (quoting *Stone*, 115 S. Ct. at 1545). Thus, these cases support the opposite conclusion of that argued by Respondent, i.e. if Congress "understood" that it had already delegated authority to the President to establish aggravating factors in all capital cases then the express delegation of that authority in espionage cases is clearly superfluous and

[1] Petitioner disagrees with this assertion, but previously addressed this argument in the Petition and, therefore, will not repeat the argument herein. *See* Petition at 17-18.

has no "real and substantial effect." *Id.; see also Kent v. Dulles*, 357 U.S. 116, 130 (1958).

Second, Respondent's legal proposition is erroneous on its face. In essence, Respondent argues that Congress relied on the President's interpretation of U.C.M.J. article 36, 10 U.S.C. § 836 as granting authority to the President to establish aggravating factors, and therefore "there is strong reason to give effect to" the President's interpretation. BIO at 12. The error in this argument lies in the fact that the President's interpretation as allegedly relied upon by Congress is irrelevant and this Court cannot give it "effect" if Congress did not—both in intent and in fact—delegate authority to the President at or before the time Rule for Courts-Martial [hereinafter R.C.M.] 1004 was promulgated.

B. Reply to Congressional Guidance Argument.

Respondent cites the synergy of the President's inherent authority as Commander-in-Chief[2] and U.C.M.J. articles 18, 36, 56, and 106a, 10 U.S.C. §§ 818, 836, 856, and 906a as delegating "ample authority" to the President to establish aggravating factors. BIO at 10. Yet, in discussing whether Congress set forth sufficient standards to guide the President in his exercise of that authority, Respondent cites only U.C.M.J. article 36 and other federal death penalty statutes.[3]

Respondent cannot have it both ways: if Article 36 does not delegate authority to the President to establish aggravating factors in capital cases, then it cannot be the basis for testing the validity of the delegation. Fur-

[2] This Court should note, however, that the United States Court of Appeals for the Armed Forces never addressed this issue. Pet. at 367a n.9 ("we need not consider what inherent authority the President would have in this area").

[3] Petitioner addressed the argument concerning other statutes previously. Pet. at 21-23.

thermore, if some other provision supplies a statutory basis for the President's authority then that same provision must be used to test the validity of the delegation and U.C.M.J. article 36 is irrelevant to the determination of whether Congress provided sufficient guidance to the President.

C. Reply to Argument That It Is Sensible for the President to Establish Aggravating Factors.

Respondent argues that it is "sensible" for the President to have authority to establish aggravating factors in capital cases. BIO at 19-20. This argument is absolutely irrelevant to the Questions Presented. The issue is whether or not Congress delegated authority to the President in a constitutional manner. Even assuming this Court believes that delegation would be a reasonable and logical action, if Congress has not properly delegated authority to the President to establish aggravating factors in capital cases, this Court cannot affirm petitioner's death sentence. *See Kaiser Aluminum & Chemical Corporation v. Bonjorno*, 494 U.S. 827, 840 (1990) (courts cannot legislate).

II. PETITIONER'S DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE IT WAS IMPOSED BY A COURT-MARTIAL COMPOSED OF ONLY EIGHT MEMBERS.

A. Reply to Sixth Amendment Argument.

Respondent argues that petitioner "had no Sixth Amendment right to a trial by a petit jury." BIO at 21. This argument is irrelevant for several reasons. First, although the Petition cites some Sixth Amendment cases, petitioner's challenge is expressly raised pursuant to the Fifth and Eighth Amendments. Second, this issue pertains only to the sentencing phase of trial and petitioner has already recognized that a capital defendant has no constitutional right to jury sentencing. Pet. at 25 n.26.

Furthermore, contrary to Respondent's argument and citation to *Ex parte Milligan*, 4 Wall. 2, 123, 18 L.Ed. 281 (1866), *Ex parte Quirin*, 317 U.S. 1, 40 (1942), and other cases, this Court has never resolved the question of whether the Sixth Amendment right to trial by jury is applicable in court-martial proceedings. As Justice Rehnquist, writing for the Court, recognized in *Middendorf v. Henry*, 425 U.S. 25, 34-35 (1976) (quoting *Milligan*, 4 Wall. at 123), *Milligan* and *Quirin* say only in *dicta* that the Sixth amendment right to trial by jury is not available to military accuseds.[4] *See also Solorio v. United States*, 483 U.S. 435, 453 n.2 (1987) (Marshall, Brennan, and Blackmun, JJ., dissenting).

B. Reply to Fifth Amendment Argument.

Respondent argues that petitioner has not been denied due process by a death sentence imposed by a court-martial composed of only eight members because the military practice of requiring only five members "has been carried forward from the earliest days of our nation." BIO at 22-23. Respondent misstates history.[5] The practice of allow-

[4] In *Milligan*, this Court dealt only with the issue of whether a citizen of Indiana, who never served in the military and had no military connection, could be tried by a military court for conspiracy against the United States in the Civil War. The Court held that the military had no jurisdiction. Likewise, in *Quirin*, this Court dealt only with the question of whether German citizens who entered the United States as spies during World War II could be tried by the United States military for violations of the laws of war. The Court held that the military did have jurisdiction. Thus, neither case presented the question that Respondent argues the Court decided.

[5] In addition, even if accurate, this historical argument is inapposite because a large number of legal practices which were viewed as constitutional two hundred years ago (or even one year ago) have been held to be unconstitutional. *See, e.g., Ryder v. United States*, —— U.S. ——, 115 S.Ct. 2031 (1995) (although numerous Coast Guard appellants have had their cases decided by civilian appellate judges who were appointed by the General Counsel of the Department of Transportation, this Court recently declared

ing only five members in general court-martial cases has only been carried forward since 1920. In fact, from 1775 until 1786, not less than thirteen officers (one President and twelve members) were required for every general court-martial. From 1786 to 1920, the Articles of War allowed for "any number of officers from five to thirteen, inclusively; but they shall not consist of less than thirteen where that number can be convened without manifest injury to the service." *See* Allred, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 Naval L. Rev. 153 (Spring 1986); W. Winthrop, *Military Law and Precedent* (rev. & enlarged 2d ed. 1920).

Next, Respondent argues that requiring only five panel members in military cases is reasonable because the function of the military is to fight wars, and if servicemembers are diverted from that function to serve as court-martial members that function is abrogated. BIO at 23. Respondent cannot, however, credibly argue that in a de minimis number of cases, the United States military cannot spare twelve servicemembers from other duties to make the important determination of whether an accused shall live or die.[6]

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that appointment of civilian judges in this manner violates the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2); *Coker v. Georgia*, 433 U.S. 584 (1977) (after hundreds of people were executed in this country for committing a rape, this Court held that the Eighth Amendment is violated when a death sentence is imposed for the crime of raping an adult woman when the victim does not die).

[6] This argument, especially in the context of a capital case, is no more credible now then it was one hundred and fifty years ago.

> [I]t was held, at an early period, (1810), by Atty. Gen. Wirt, that . . . "It is difficult to conceive an emergency so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, without manifest injury to the service. . . ."

Winthrop at 79 (footnote omitted). In fact, this argument has even less credibility now when the armed services are composed of hundreds of thousands—if not millions—of servicemembers.

CONCLUSION

In sum, petitioner's status as a servicemember did not strip him of his constitutional rights as an American citizen. Likewise, labelling his trial as a military court-martial did not strip him of his constitutional rights, including the right to due process and the right to protection from cruel and unusual punishment. This Court should grant certiorari to ensure that the military justice system, at least in capital cases tried during peacetime, is in fact a system of justice conducted in a manner consistent with the United States Constitution.

Respectfully submitted,

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